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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

ANNE C. BELL, Petitioner,

vs.

LOWRY M. BELL, JR., Respondent

APPENDIX

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N-3323

SUPREME JUDICIAL COURT
Norfolk, January 11,1984
--September 13, 1984

ANNE C. BELL

VS.

LOWRY M. BELL, JR.

Present: Hennessey, C.J.,
Wilkins, Liacos, Abrams,
Nolan, Lynch & O'Connor, JJ.

O'CONNOR, J. The plaintiff appealed to the Appeals Court from the dismissal of her contempt complaint against her former husband for his failure to continue support payments allegedly owed to her under a judgment of divorce. The Appeals Court, by a two-to-one decision, reversed the judgment of the Probate Court. Bell v. Bell, 16 Mass. App. Ct. 188, 197 (1983). We granted the defendant's application for further appellate review. We affirm the judgment of the Probate Court.

The judgment of divorce was entered on April 28, 1976, effective as of

November 28, 1975. It incorporated a separation agreement that provided in part that the defendant would make significant monthly alimony payments to the plaintiff for a period of fifteen years following the entry of a final judgment of divorce or until the "happening of the following contingencies: 1) the (w)ife's death, 2) the (w)ife's remarriage, and/or 3) the (w)ife's living together with a member of the opposite sex, so as to give the outward appearance of marriage at any time prior to May 1, 1981, whichever of the . . .three contingencies happens first." The controversy concerns the interpretation and application of the third contingency provision (cohabitation clause). After a trial of the contempt matter, the judge made written findings and rulings. Based on his subsidiary findings with respect to the conduct of the plaintiff,we conclude that she "liv(ed) together with

a member of the opposite sex, so as to give the outward appearance of marriage . . . prior to May 1, 1981.[1] It follows that the judge correctly ruled that the defendant's obligation to pay alimony had terminated and the contempt complaint was properly dismissed.

The judge found that following the judgment of divorce the plaintiff resided at the marital home in Cohasset on a regular basis until March, 1978. From March, 1978, until that summer she resided part of the time at the Cohasset home and part of the time in an apartment leased by a man identified as "J.R." From June,1978,

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[1]We consider the cohabitation clause to be unambiguous as applied to the facts of this case, and therefore we do not rely on parol evidence or on findings of the judge to determine the intent of the parties.

through October, 1979, she resided on a regular basis with J.R. in his apartment, and from October, 1979, to June, 1980, she resided with him at his apartment "for the most part." The judge also found that "(d)uring the period of time from June, 1978 through May, 1981, the plaintiff on a regular basis cohabited with J.R. . . . during which time they shared the same bedroom."

In addition, the judge made numerous detailed findings which we summarize briefly. The apartment lease stood solely in J.R.'s name. The plaintiff's name did not appear on the door or on the mailbox and she received her mail elsewhere. J.R. paid the rent and the plaintiff purchased the food and did most of the cooking and cleaning. Part of the furniture in the apartment was his and part of it was hers. They maintained separate bank accounts and never commingled assets. They took trips

together and divided the costs. They socialized together. The plaintiff never represented to anyone that she was married to J.R. She never used his surname.

The cohabitation clause in question allowed the termination of alimony payments in the event that the plaintiff lived with a man "so as to give the outward appearance of marriage." It focused on the possibility of the plaintiff's sharing a home with a man, and it contemplated that that might occur in either of two ways: in a way that would create the appearance that the plaintiff and the man were married, or in a way that would not create such an appearance. Clearly, the parties thought that a man and a woman could live together in a way that would normally be associated with being married without their actually being married and without claiming or acknowledging a marriage relationship. It is difficult to

conceive of what conduct the parties contemplated if that conduct did not at least include the plaintiff's sharing a bedroom with a man on a regular basis for approximately three years.

The Appeals Court held that it was the intention of the parties that alimony might be terminated only on the death or remarriage of the plaintiff, or "in circumstances so closely like marriage as to result in Mrs Bell acquiring significant actual support or a new right to support from a man prior to the specified date in 1981." Bell v. Bell, supra, at 194. The Appeals Court correctly noted that, in the absence of a formally solemnized marriage, the plaintiff could not become entitled to support from a man except by a contract providing for it. Id. at 192-193. Thus, in effect, the Appeals Court interpreted the separation agreement to provide for the termination of alimony in

less than fifteen years only if the plaintiff died or remarried or, irrespective of appearances, if she actually received significant financial support from a man other than the defendant, or entered into a contract for support.

The plain language of the agreement cannot properly be ignored. The clause in question does not mention support or the plaintiff's continuing need for it in the absence of a new source. It would have been relatively easy for the parties to have expressly provided for the termination of alimony in the event of the plaintiff's being substantially supported by another man or becoming contractually entitled to such support. There was no need to subtly express that thought by reference to the plaintiff's living with a man so as to give the outward appearance of marriage. The language is better suited, and we think was employed, to

provide for termination of the plaintiff's right to alimony if she were to remarry or were to live as though she were remarried.

In arriving at its interpretation of the cohabitation clause as relieving the defendant of his alimony obligation only if the plaintiff were to receive substantial support or were to become contractually entitled to receive support from another man, the Appeals Court relied in part on a provision in the separation agreement that "neither the (h)usband nor the (w)ife will hereafter interfere with the personal liberty of the other, and each may lead his or her life free from any criticism or restraint by the other." Bell v. Bell, supra at 194. The court reasoned that if the defendant were entitled to terminate alimony payments in response to the plaintiff's arrangement with J.R., the defendant could coerce the plaintiff's conduct in a way that was in-

consistent with the intent of the parties as expressed in their agreement. Id. at 194-195. It is true that the disputed clause, as we interpret it, might give the plaintiff reason not to live with a man so as to give the outward appearance of marriage. It is also true that the provision permitting a termination of alimony in the event of the plaintiff's remarriage might give her reason to decide against remarriage. We think, however, that it is clear that the parties did not intend by the noninterference provision to preclude the defendant from possibly influencing the plaintiff's choices by terminating alimony payments in the event she were to remarry or were to live with a man in the manner of a married couple. Termination of alimony payments in such circumstances cannot be considered interference with the plaintiff's personal liberty or "criticism or restraint" within the meaning of the

agreement.

Finally, the plaintiff argues that "(c)ohabitation clauses which operate to bar the receipt of support payments by the wife upon the commencement of a non-marital relationship with a man, unfairly discriminate against women, both pursuant to the equal protection clause of the United States Constitution and the Massachusetts Equal Rights Amendment." The plaintiff's argument challenging the constitutionality of the provision appears for the first time on appeal to this court. Because this argument was not raised below, we decline to consider it. See M.H. Gordon & Sons v. Alcoholic Beverages Control Comm'n, 386 Mass. 64, 73 (1982); Trimmer, petitioner, 375 Mass. 588, 592 (1978).

Judgment of the Probate Court affirmed.

WILKINS, J. (dissenting, with whom Liacos and Abrams, JJ., join). The opinion of the Appeals Court presents a reasonable interpretation of the separation agreement, certainly a view preferable to that expressed in the opinion of this court. The court's opinion gives no effect to the provision in the separation agreement that neither party will "interfere with the personal liberty of the other, and each may lead his or her life free from any criticism or restraint of the other." We would reverse the judgment of the trial court by focusing on the crucial language of the separation agreement, and would thus ignore the details of the private arrangements between Mrs Bell and J.R. that have influenced the opinion of this court and the majority and dissenting opinions of the Justices of the Appeals Court.

The question for decision is what the

parties meant by the phrase "(3) (the w)ife's living together with a member of the opposite sex, so as to give the outward appearance of marriage at any time prior to May 1, 1981 . . . ." We know that the wife's living with a man would not alone terminate the husband's alimony obligation. The living together must have the appearance of marriage and that appearance must be outward. The court is wrong, therefore, in relying exclusively on the fact of "(Mrs Bell's) sharing a bedroom with (J.R.) on a regular basis for approximately three years." Ante at . That fact presents no outward appearance of anything. It was a private matter.

The significant point is that all the facts concerning the conduct and relationship of the wife and J.R. are equally consistent with a couple's not being married as they are with a couple's being

married.[1] Couples, married and unmarried, share living and travel expenses when they live together. In today's society, for better or for worse, unmarried couples live together and, from that fact alone, no conclusion can fairly be drawn that such couples are married or that they give the outward appearance of marriage. The fact of sharing a bedroom over a period of time is thus inconclusive on the question of an outward appearance of marriage.

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[1] There is one fact which, if true, might indicate that Mrs Bell and J.R. did not give the outward appearance of marriage. She testified that, during the entire time she had known J.R., she had dated other men and that she and J.R. had no arrangement by which she could not go out with other men. The opinion of the court ignores both this testimony concerning outward conduct and the trial judge's failure to consider it. The trial judge simply found that "on rare occasions (Mrs Bell) brought someone other than J.R. to . . . .cocktail parties" at J.R.'s apartment.

The disputed language would apply, however, if Mrs Bell were to have held herself out as married to J.R. That fact would have given the outward appearance of marriage. The facts in this case incontestably show that Mrs Bell made no such representation. It is not for us to apply our moral judgment to conclude that the sharing of a bedroom over a period of time should be treated as giving an outward appearance of marriage when, in fact, in today's world, such a sharing of a bedroom gives no such appearance.

ABRAMS, J., (dissenting). I cannot share the court's certitude that the plaintiff and her former husband agreed that his obligation to pay alimony would terminate if she shared a bedroom with another man "on a regular basis." Ante at . A separation agreement incorporated in a judgment of divorce is not an ordinary contract, but a judicially sanctioned contract setting forth the allocation between former spouses of rights, responsibilities, and resources. Although wives today may be less economically dependent on their husbands than was the case in the past, it remains true that the typical alimony recipient is a woman who has sacrificed her earning capacity to her marriage and who, as an equitable and practical matter, must look to her former husband for financial support following a separation or divorce. Such women have little bargaining power and to a large

extent must rely on judicial supervision to ensure that their entitlement to support is not made contingent on unjust and unreasonable conditions. See Knox v. Remick, 371 Mass. 433, 436-437 (1976). By giving its imprimatur to an interpretation of the Bells' separation agreement that hinges the plaintiff's entitlement to support on her conformity to life-style requirements imposed by the defendant, the court encourages economically-dominant husbands to meddle arbitrarily with the postdivorce lives of their wives, and thereby sends an unfortunate message to probate judges charged with scrutinizing such separation agreements to ensure that the agreements are "fair and reasonable." Knox v. Remick, supra, at 436.

To be sure, there is nothing unreasonable about provisions allowing the defendant and others similarly situated to discontinue support payments in circumstances

where the recipient's need is eliminated or met by another source. As construed by the court, the separation agreement and divorce judgment terminated the plaintiff's right to support solely because of her involvement in a relationship that does not have the defendant's approval, without any inquiry into its effect on her need for support and without reciprocal restraint on her husband.

Such a purely punitive elimination of support cannot be reconciled with the agreement's guarantee that "each (spouse) may lead his or her life free from any. . . . restraint by the other." But even if, as the court decides, the unjustified limitation on the plaintiff's personal life imposed by a cutoff of support in the circumstances of this case is not plainly inconsistent with the terms of the Bells' agreement, public policy considerations should operate to preclude the result

reached by the court. It is well established that a contractual restraint on fundamental private rights is subversive of public policy if it is "more onerous in its nature than is reasonably necessary for the proper fulfillment" of its purposes. Gleason v. Mann, 312 Mass. 420, 423-424, 425 (1942)(agreement that bound woman "to live a life of celibacy" unenforceable on public policy grounds where obligation "could be of no benefit" to employer). Compare Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 102-103 (1979). By interpreting and enforcing the clause at issue here so as to give judicial sanction to a termination of support, the court allies itself with alimony payors who exercise their economic power in a manner that unreasonably interferes with the private, autonomous lives of the spouse from whom they have been divorced. I dissent.

Nor. 82-379

APPEALS COURT
Norfolk, February 15, 1983--June 22, 1983

ANNE C. BELL

VS.

LOWRY M. BELL, JR.

Present: Hale, C.J.,
Cutter, and
Kaplan, JJ.

CUTTER, J. Mrs. Bell appeals from the dismissal of her contempt complaint against her former husband for his failure to make support payments allegedly due to her under a judgment of divorce. The issue before us is the interpretation of a provision in the parties' separation agreement, reading that document as a whole and in the light of relevant Massachusetts law.[1]

[1]We refrain from stating any views concerning the conduct of any person involved in this matter. Any such views would be completely immaterial to the issue of interpretation.

The agreement and all the evidence before the probate judge are before us. We apply our own interpretation of the separation agreement to the subsidiary facts found by the judge (as distinguished from certain conclusions drawn by him, we think erroneously, from his subsidiary findings).

The parties were married in 1950. They have had two children, one born in 1956 and one born in 1958. Bell was in 1975 a vice-president of a substantial company. Mrs. Bell then was unemployed. Differences arose between Mrs. Bell and Bell. By 1976 they had been separated for some time.

On April 26, 1976, the parties entered into a separation agreement. By its terms Bell (subject to arbitration in the event of a substantial decline in his gross income) was to pay (as alimony

for tax purposes) significant monthly amounts for the support of Mrs. Bell.[2] These payments were to decrease in amount over fifteen years following the entry of final judgment of divorce and were to "terminate upon the happening of the following contingencies: (1) the (w)ife's death, (2) the (w)ife's re-marriage, and . . . (3) (the w)ife's living together with a member of the opposite sex, so as to give the outward

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[2]The Bells owned in 1976, as tenants by the entirety, a house in Cohasset worth $114,000, subject to a mortgage of about $36,000. They owned jointly certain savings accounts and securities. The agreement made an allotment of property to Mrs. Bell, including a transfer to her of (a) the Cohasset house (subject to the mortgage), (b) its tangible contents, (c) certain other specified tangibles, and (d) their joint accounts and their jointly held security accounts. The husband was to pay to her $100,000 on the entry of final judgment of divorce. It is not contended in this case that Bell failed to carry out the provisions of the separation agreement which were to take effect upon the completion of the original divorce proceeding.

appearance of marriage at any time prior to May 1, 1981, whichever of the . . . three . . . contingencies happens first." For convenience the preceding sub-paragraph (3), is hereafter sometimes referred to as "the disputed language."

A judgment nisi of divorce was entered as of November 28, 1975. This judgment incorporated the separation agreement, specifically stating that the "(a)greement shall survive this judgment and have independent significance." Bell has married again since the judgment became absolute.

On April 8, 1981, Mrs. Bell filed this comtempt complaint. Bell answered contending that his obligation to support Mrs. Bell had terminated because she was "living together with a member of the opposite sex so as to give the outward appearance of marriage."

Following a trial the probate judge dismissed Mrs. Bell's contempt complaint.[3] She has appealed. The judge made subsidiary findings of fact essentially as follows:

(a) Mrs. Bell resided at the Cohasset house (see note 2 supra) until March, 1978. That spring she spent some time at the Cohasset house and some time at the one-bedroom Boston apartment of a man referred to in the record as J.R.'s apartment except for a total of three weeks spent "with her daughter on an irregular basis." From October, 1979, through June, 1980, she stayed in the Cohasset house on a sporadic basis but "for the most part" stayed at J.R.'s

[3]He also dismissed with prejudice a counterclaim filed by Bell seeking to recover amounts of alimony theretofore paid by him, and entered an order that Bell and Mrs. Bell were to pay their own costs and counsel fees. No appeal was claimed by Bell from the dismissal of his counterclaim.

apartment. She sold the Cohasset house on April 1, 1980, and had removed her belongings by June, 1980.

(b) The apartment lease stands solely in J.R.'s name. Mrs. Bell's name does not appear in the lease or on the mailbox or the door. The monthly rent ($450.00) and utilities (except for Mrs. Bell's long distance calls, which she has paid) are paid by J.R.. From June, 1978, through May, 1981, she "cohabited with J.R." at the apartment. She "purchased all of the food and did most of the cooking and cleaning." Part of the furniture at the apartment is hers. Part belongs solely to J.R..

(c) Mrs. Bell and J.R. "have always maintained separate bank accounts, checking accounts, and investments." They have never commingled assets or held joint bank accounts.

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(d) Until June, 1980, Mrs. Bell remained a member of a club in Cohasset. During this time she took J.R. there as her guest about once a month for tennis and social functions. He reciprocated by taking her as his guest to clubs to which he belongs. After June, 1980, she reimbursed him for half the bills incurred by him for taking her to his clubs as his guest.

(e) Mrs. Bell has never maintained a mail address at J.R.'s apartment. She received mail at Cohasset until she sold the house in 1980. Thereafter she received mail in care of her employer until her employment (apparently obtained after the divorce) was terminated on January 31, 1981. Since then she has received mail at a post office box.

(f) She and J.R., in addition to playing golf and tennis and dining together, have played bridge together

about twice a week, occasionally at clubs "prescribed by" a national contract bridge league. They have taken trips together. She has paid one-half of the costs of each trip. They have given cocktail parties together and attended such parties together. At no time has Mrs. Bell represented to any third party that she was married to J.R. nor has she ever used his surname.[4]

The probate judge concluded that, as of February 1, 1981, Mrs. Bell "had established a permanent relationship with J.R." and "was habitually residing with . . . (him) in a life style which would lead a reasonable person to believe

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[4]The probate judge found, after hearing Mrs. Bell's testimony (and we, after reading that testimony agree) that Mrs. Bell "did not, at any time, conceal her cohabitation with J.R. either from the court or from Bell." Certainly her testimony, as we read it, was marked by candor and showed no attempt to conceal or distort any conduct even if it might turn out to be adverse to her present contentions.

that they were living in a marital relationship" and that their "conduct . . . gave the outward appearance of marriage." The judge also concluded that Mrs. Bell as of February 1, 1981, "was receiving a measure of support from J.R. by virtue of his paying the rent and utilities and that continued alimony paid by" Bell "would, to a certain extent, provide" Mrs. Bell "with overlapping support."

The probate judge, in addition to drawing conclusions from his subsidiary findings as just indicated, made rulings of law (1) that the "relationship (of Mrs. Bell and J.R.) is sufficient to create an outward appearance of marriage"; (2) that the language about "outward appearance of marriage" relates to Mrs. Bell's conduct and the "objective nature of the relationship and does not depend on whether . . . third persons are led to believe in the existence of a

ceremonial marriage"; (3) that the disputed language of the agreement does not require Bell to prove that Mrs. Bell represented to third persons that she and J.R. were married; and (4) that Mrs. Bell has forfeited her right to alimony under the agreement after February 1, 1981, because to rule otherwise would permit an ex-wife to receive support from another man and still compel her ex-husband to pay alimony by simply refraining from any formal marriage ceremony.[5]

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[5]The judge also ruled, perhaps in too expansive terms, that it was permissible to receive extrinsic testimony concerning the disputed language of the separation agreement, which he regarded as ambiguous, "as an aid to construing the contract and the intent of the parties." He received testimony from the attorney who represented Bell in negotiating the separation agreement. Mrs. Bell's former attorney's somewhat inconclusive testimony so far as it relates to that attorney's purpose in requesting the insertion of the disputed language. See Liacos, Handbook of Mass. Evidence, 385-392 (5th ed. 1981). We regard his testimony

1. Massachusetts does not recognize common law marriage. See Davis v. Misiano, 373 Mass. 261, 262-263 (1977), holding that, despite "(c)ohabitation (with a man) within the Commonwealth, a woman has no right to receive support" from him, absent a formal solemnization of marriage. See also Heistand v. Heistand, Mass. Adv. Sh. (1981) 1561, 1565-1567. Compare Glazer v. Silverman, 354 Mass. 177, 197-181 (1968), and Ruquist v. Ruquist, 367 Mass. 662, 664-667 1975), in each of which, on balance, special equitable considerations (not present here) were deemed sufficient to justify sustaining the trial court's termination of support provisions.

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5 as helpful only as it discloses some background of the negotiations, by showing that the insertion of the disputed language was requested by Bell's former attorney, and that the suggestion in some respects was objected to by Mrs. Bell's then counsel.

Certainly, unless perhaps by some contractual arrangement, Mrs. Bell could not obtain in Massachusetts the right to support from J.R. without assuming the obligations to him involved in a ceremonial marriage. The evidence shows that she was expecting no support from J.R. and asserting no claim to it. Instead she was attempting to pay her reasonable share of their joint expenses.

2. No Massachusetts case dealing with a provision precisely like the disputed language has been called to our attention. See as to somewhat related problems, Surabian v. Surabian, 362 Mass. 342, 346 (1972), and cases cited. See also Gerrig v. Sneirson, 344 Mass. 518, 520-521 (1962); Lombard, Family Law, §§ 1265, 1351, 2245 (1967 and Supp. 1981). An annotation in 98 A.L.R. 3d 453 (1980) deals (see note 6 at 457) primarily with the effect upon alimony of an ex-wife's

conduct after the divorce judgment where there is either no separation agreement or the agreement is merged in the judgment.

When the Bell's separation agreement is read as a whole, one probable meaning of the disputed language becomes apparent. As the Surabian case indicates, the death or remarriage of Mrs. Bell, by the express terms of the separation agreement, would have terminated her right to alimony. Actual remarriage presumably would have given her a "right to be supported by another man." See Southworth v. Treadwell, 168 Mass. 511, 512-513 (1897). The disputed language appears in the same sentence of the separation agreement as the provisions concerning death and remarriage (both circumstances in which Mrs. Bell would have no further need for support). This we regard as strong indication that, where there is a

continuing need for a right to support, that need should be a primary consideration in interpreting and applying the disputed language.

This disputed language also must be read in connection with other provisions of the separation agreement. It was expressly recited that, although Mrs. Bell (in 1975) had an unstated amount of "assets standing in her own name," she was "primarily dependent on the (h)usband for her care, support and maintenance." There also was an explicit general provision that "neither the (h)usband nor the (w)ife will hereafter interfere with the personal liberty of the other, and each may lead his or her life free from any criticism or restraint by the other." The purpose of the entire agreement was stated in part as "to settle the (h)usband's obligation

arising out of the marital relationship to support and maintain the (w)ife" as set forth in the agreement.

The predominant interest of the wife plainly was in making certain that she would have the support reasonable for her to expect from a business executive of some standing to whom by 1975 she had been married for a quarter of a century and whose children she had raised. Nothing about her expense-sharing arrangement with J.R. indicates any consequent diminution in her need for support.

The provision that neither Bell nor Mrs. Bell would interfere with the other's liberty to lead his or her life free of restraint is plainly inconsistent with any effort by Bell to control her life-style. That life-style was for her to determine, free from his coercion. It may well be that her avoidance of further

legally binding marital commitments in some degree was and is based on her earlier experience with marriage. In any event, the provision (for noninterference) leads us to interpret the disputed language as calling for a cessation of alimony only upon remarriage or in circumstances so closely like marriage as to result in Mrs. Bell acquiring significant actual support or a new right to support from a man prior to the specified date in 1981. Obviously Bell (who has remarried) was under no economic coercion, based on the separation agreement, not to remarry or even to refrain from less binding arrangements. On the other hand, the threat or fear of loss of alimony could well be coercive of the arrangements made by Mrs. Bell.[6]

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[6]Questions of policy, perhaps strengthened by the Equal Rights Amendment (art. 1 of the Declaration of Rights of the Massachusetts Constitution as amended by art. 106 of the Amendments (1976) may

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3. In our opinion, the probate judge was clearly in error (both on the evidence and on his own subsidiary findings) in certain of his conclusions and rulings.

(a) We regard as without basis in his subsidiary findings or in the evidence the judge's conclusions that Mrs. Bell was receiving "a measure of support" from J.R.. The judge had found that, although J.R. alone paid the apartment rent of $450 per month and some utility expenses, Mrs. Bell purchased all the food and did most of the cooking and cleaning. With food costs current since the date of the agreement, it appears from the evidence that Mrs. Bell

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[6]set limits on the use by a spouse of undue financial or other pressure to impose a given life pattern upon the other spouse after termination of the marital relationship. Such questions do not arise on the interpretation of the disputed language here adopted.

was contributing approximately as much as J.R. toward their joint living costs. If it be relevant, precise or even substantial equality of sharing expenses could not be expected reasonably in such an informal situation even from a woman apparently determined (as the evidence strongly suggests) to pay her own way in a relationship which involved no permanent commitment or ceremonial marriage.

(b) As already stated, we interpret the disputed language as requiring no forfeiture of alimony so long as Mrs. Bell does not obtain the right to support from another man by a ceremonial marriage or by some binding arrangement, at least where the evidence shows that she was not substantially supported by him. We think it immaterial whether persons who did not know her may have thought that she was married to J.R..

It was not a matter with which strangers reasonably should have concern.[7] This is unobtrusive and inconspicuous expense-sharing arrangement in the substantial anonymity of urban apartment life cannot be appraised reasonably by what strangers would or may have thought about it.[8]

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[7]The probate judge's conclusion that the disputed language relates to the "objective nature of the relationship and does not depend on whether . . . third persons are led to believe in the existence of a ceremonial marriage" may be internally inconsistent. It, however, tends to recognize that it is irrelevant what strangers to Mrs. Bell and J.R. may think on the subject.

[8]The probate judge interpreted the disputed language "as intended to prevent the elimination of alimony in the event that . . . (Mrs. Bell) subsequent to her divorce, lived with a relative or took in a boarder" or "in the event . . . (she) lived with another man for a short or insubstantial period of time, as opposed to a protracted period of time." We reject this interpretation. It implies the unlikely intention that, although there would be no cessation of alimony if she engaged in brief, casual, or promiscuous affairs, alimony must cease if she participates in a more stable, more sedate, and longer expense-sharing arrangement.

As stated above, there was no evidence whatsoever that Mrs. Bell ever held herself out as J.R.'s wife to any person (whether or not they knew her). See Northrup v. Northrup, 43 N.Y. 2d 566, 570-573 (1978). Compare O'Connor Bros. Abalone Co. v. Brando, 40 Cal. App. 3d 90, 95 (1974). Contrast Lang v. Superior Court, 53 Cal. App. 3d 852, 856-861 (1975), which viewed the statute there discussed as involving "holding out" to the general public and not merely to persons who knew the couple. The Northrup case is based largely upon the provisions of a pertinent New York statute, N.Y. Dom. Rel. Law § 248 (see now McKinney 1977). Whether, however, there is "holding out" by a woman that she is married, to persons having an interest in inquiring about her status (or at least in fact inquiring), may be,

in our opinion, a significant consideration in determining whether there exists the outward appearance of marriage.[9] In the light of the consideration mentioned and of our interpretation of the disputed language, we perceive on this record no basis for the termination of Mrs. Bell's alimony.

4. The judgement is reversed and the case is remanded to the Probate Court for further proceedings consistent with this opinion. We think (essentially as did the probabe judge) that this is a case in which costs in the trial court and on appeal should be shared evenly and in which each party should bear the reasonable counsel fees

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[9]See other New York decisions, e.g., Stern v. Stern, (N.Y.) 88 Misc. 2d 860, 864 (N.Y. Sup. Ct. 1976); Citron v. Citron, 91 Misc. 2d 785, 788 (N.Y. Sup. Ct. 1977). See also Levine v. Levine, 79 Misc. 2d 149, 151 (N.Y. Sup. Ct. 1973). Compare Lang v. Superior Court, 53 Cal. App. 3d at 861.

incurred by him or her.

So ordered.

HALE, C. J. (dissenting). In my view the majority ignores the plain language of the agreement. The plaintiff by living with J.R. in what the judge found to be "a permanent and enduring relationship" and by socializing, eating meals, taking trips, and attending functions with J.R. was "living together with a member of the opposite sex, so as to give the outward appearance of marriage." The majority places heavy emphasis on the amount of support received by Mrs. Bell and concludes that the disputed clause would not operate to terminate her right to alimony unless she became entitled to receive support from a man (part 1 of the majority opinion leaves unclear just how that can be accomplished without a marriage) or acquired "significant actual support" from a man. While arrangements

for support might in some cases be a factor to consider in determining whether there was an "outward appearance of marriage," in the typical case, the arrangement for support or the payment of expenses would be a private matter having little bearing on outward appearances. There is no evidence in the record before us that they were treated otherwise by Mrs. Bell and J.R..

In the instant case, all of the critical factors of a marital relationship were present. While Mrs. Bell may have carefully avoided representing that she was married to J.R., she enjoyed what was essentially a marital type relationship with him. She cannot now avoid the financial consequences of those actions by relying on factors such as the maintenance of a separate mailing address or the failure to sign

the lease, which did not affect the basic character of their relationship. The avoidance of a change of name by Mrs. Bell, the couple's non-use of "Mr. and Mrs.," and their use of separate bank accounts are practices followed by many married couples. If such formalities are to be given the effect of precluding, as matter of law, a finding that Mrs. Bell's living arrangement gave the outward appearance of marriage, the clause in question -- not uncommon in separation agreements -- will as a practical matter be nullified.

THE COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

NORFOLK DIVISION PROBATE AND FAMILY COURT
NO: 74D1615

Anne C. Bell, Plaintiff)
)
vs.)
)
Lowry M. Bell, Jr., Defendant)
January 12, 1982

PROCEDURAL BACKGROUND
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

I. PROCEDURAL BACKGROUND

The plaintiff and defendant were divorced by a judgment nisi dated April 28, 1976, which was made nunc pro tunc November 28, 1975. The Judgment incorporated a separation agreement dated April 26, 1976, which did not merge into the Judgment, but rather survived as an independent contract.

On April 8, 1981 the plaintiff filed a complaint for contempt alleging that

the defendant had failed to make support payments required by the separation agreement which were due February 1, March 1, and April 1, 1981. The total amount alleged to be due the plaintiff as of the time of the hearing of the contempt was $6,439.98.

On May 8, 1981 the defendant filed an Answer to the plaintiff's complaint for contempt denying that he had not obeyed the judgment nisi, and denying that he was in civil contempt. The defendant further asserted a counter-claim alleging that his obligation to support the plaintiff terminated on account of the plaintiff's "living together with a member of the opposite sex so as to give the outward appearance of marriage," which language was contained in the separation agreement. The defendant further asserted in his counterclaim that the plaintiff had

wrongfully and fraudulently collected alimony payments for a period of four years, and sought a judgment against her in the amount of $74,033.52, which allegedly was paid to her during the period of her cohabitation with a member of the opposite sex.

On May 15, 1981 the plaintiff filed her Answer to the defendant's counter-claim denying the pertinent allegations, and asserted the affirmative defenses of lack of subject matter jurisdiction and estoppel.

II. FINDINGS OF FACT

1. The plaintiff and defendant were divorced by a judgment nisi entered on April 28, 1976, and made nunc pro tunc to November 28, 1975.

2. The judgment nisi incorporated a separation agreement dated April 26, 1976, which agreement survived the judgment as an independent contract.

3. The separation agreement required the defendant to pay to the plaintiff alimony for a period of fifteen years in 180 monthly installments which were in gradually diminishing amounts.

4. The defendant paid the amounts required by the agreement for the first 57 months following the entry of the final judgment of the divorce. Thereafter he refused to pay the support payments for the four months, due February 1, March 1, April 1 and May 1, 1981 totaling $6,439.98, which represents three monthly payments each in the sum of $1,682.91, and one monthly payment in the sum of $1,391.25.

5. The basis of the defendant's refusal to pay support for the aforesaid four months was set forth in a letter dated January 19, 1981 sent by him to the plaintiff alleging that she was

"openly and continuously cohabiting with a certain gentleman" for approximately four years, which conduct on the plaintiff's part, according to the defendant, justified a termination of alimony payments pursuant to the terms of the separation agreement.

6. Article 2 paragraph (b) of the separation agreement provides that all payments by the defendant to the plaintiff for the latter's care, support and maintenance shall terminate upon the happening of any one of the following contingencies: "(1) the wife's death, (2) the wife's remarriage, and/or (3) said wife's living together with a member of the opposite sex, so as to give an outward appearance of marriage at any time prior to May 1, 1981, whichever of the said three contingencies happens first.

7. At the commencement of the hearing the parties stipulated that the arrearage, if actually determined to be owed, should be in the amount of $6,439.98 as of May 1, 1981. The parties further stipulated that the defendant had the ability to pay the arrearages, if it were determined the said arrearages were actually owed pursuant to the terms of said agreement.

8. Pursuant to the terms of the separation agreement, the plaintiff received title to the marital home located at 135 Nichols Road, Cohasset (hereinafter referred to as Cohasset House).

Following the entry of the judgment nisi, the plaintiff resided at the Cohasset House on a regular basis until March of 1978. From March 1978 until the summer of 1978 the plaintiff resided some of the time at

the Cohasset House and some of the time at 21 Beacon Street, Boston, in an apartment leased by an individual identified by agreement of the parties as "J.R.".

9. The plaintiff rented the Cohasset House to Donald O'Neil from the summer of 1978 to November 1978. Thereafter the plaintiff permitted the Cohasset House to be sublet to Leland Wilson from November, 1978 to May, 1979. Thereafter the plaintiff rented the Cohasset House to Ronnie Wiseburg from June, 1979 to October 1979.

10. The plaintiff sold the Cohasset House on April 1, 1980, but was permitted by the buyer to remain there until June 1980. Between the period of April 1, 1980 and June 1980, the plaintiff packed her belongings and removed them from the Cohasset House.

11. From the time of the entry of the judgment nisi on April 28, 1976 until March 1978 I find that the plaintiff resided at the Cohasset House on a regular basis. From March 1978 through June 1978 the plaintiff resided at the Cohasset House on an irregular basis, during which time she also resided with J.R. at his apartment at 21 Beacon Street on an irregular basis.

12. The plaintiff did not reside at the Cohasset House from June 1978 through October 1979, during which period she resided on a regular basis with J.R. at his apartment at 21 Beacon Street, Boston.

During this period of time the plaintiff also resided with her daughter on an irregular basis for a total accumulative time of three weeks.

13. The plaintiff resided in the Cohasset House from October 1979 through

June 1980 on a sporadic basis and for the most part during that period of time resided with J.R. at his apartment at 21 Beacon Street, Boston.

14. The lease at 21 Beacon Street, Boston stands solely in J.R.'s name. The plaintiff's name does not appear in the lease, or the mailbox of on the door. The monthly rental in the approximate amount of $450.00 per month is paid solely by J.R.

15. During the period of time from June 1978 through May 1981, the plaintiff on a regular basis cohabited with J.R. at the 21 Beacon Street apartment, during which time they shared the same bedroom. The plaintiff purchased all of the food, and did most of the cooking and cleaning. J.R. did some of the cooking and cleaning during this time.

16. In addition to the monthly

rental of $450.00, J.R. paid all the utilities of the apartment, with the exception of long distance telephone calls made by the plaintiff for which she paid.

17. Part of the furniture and furnishings located at 21 Beacon Street, Boston, belong solely to the plaintiff, and part belong solely to J.R. The plaintiff and J.R. have always maintained separate bank accounts, checking accounts and investments. At no time have J.R. and the plaintiff commingled their assets nor have they ever created any joint accounts.

18. After the entry of judgment nisi and until the summer of 1980, the plaintiff maintained a membership at the Cohasset Country Club, and on a regular basis invited J.R. as a guest to dinner and for tennis and for other social functions. The plaintiff terminated her

membership at the Cohasset Country Club in June 1980. During this period of time J.R. did not reimburse her for his guest expenses at the Cohasset Country Club.

19. The rules of the Cohasset Country Club permitted the plaintiff to have a guest once a month and that guest usually was J.R.

20. During this same period of time, J.R. maintained his membership at the Dedham Country Club and the Country Club at Brookline and frequently entertained the plaintiff at both clubs at his sole expense. After the plaintiff terminated her membership at the Cohasset Country Club in June 1980, she then reimbursed J.R. for one half of his bills at his Country Clubs which were incurred by her as a guest.

21. The plaintiff never maintained a mailing address at 21 Beacon Street,

Boston, and received her mail at the Cohasset House until it was sold in April 1980. Thereafter the plaintiff received her mail at the place of her employment, the Flatley Company, located at 18 Tremont Street, Boston, until January 31, 1981 when she terminated her employment. Following the termination of her employment, the plaintiff received her mail at a post office box in Government Center, Boston.

22. In addition to the Country Club activities of golf, tennis, and dining shared by the plaintiff and J.R., they also played bridge approximately twice a week and on occasion twice a month at the Cavendish and Puritan Clubs and at other locations prescribed by the American Bridge Contract League.

23. The plaintiff also took several vacation trips with J.R. which are described as follows:

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(a) In the summer of 1978 the plaintiff and J.R. travelled to Ireland together. The plaintiff repaid J.R. the sum of $800.00 which represented one half of the costs of the trip.

(b) In February, 1978 the plaintiff and J.R. stayed at the Sunlight Inn in Bermuda for two weeks. The plaintiff paid for one half of the costs of the trip.

(c) In 1980 the plaintiff and J.R. took an automobile trip to Washington D.C. where they stayed approximately four days.

24. During the trips to Ireland and Bermuda, J.R. registered at the hotels upon arrival. The plaintiff did not register at either hotel in her own name.

25. From the period of time commencing in the summer of 1978 through May 1981 the plaintiff and J.R. had

cocktail parties at 21 Beacon Street, Boston. Prior to these cocktail parties the plaintiff and J.R. discussed who they wished invited as their guests. In addition, the plaintiff and J.R. attended several parties together and on rare occasions the plaintiff brought someone other than J.R. to these cocktail parties.

26. At no time did the plaintiff represent to a third party that she was married to J.R., nor did she at any time utilize J.R.'s surname.

27. Attorney Burton Schair represented the defendant throughout 1975 and 1976, during which time the terms of the property settlement agreement were negotiated with Attorney Brooks Potter, who represented the plaintiff.

It was the intent of Attorney Schair and his client, the defendant, to insert language in the agreement which

have the effect of terminating alimony in the event the plaintiff were to live with another man who was not related to her for a prolonged period of time as opposed to a temporary liaison. The language "said wife's living together with a member of the opposite sex, so as to give the outward appearance of marriage" was intended to prevent the elimination of alimony in the event that the plaintiff, subsequent to her divorce, lived with a relative or took in a boarder. The language also was intended to prevent the termination of alimony in the event the plaintiff lived with another man for a short or insubstantial period of time, as opposed to a protracted period of time.

28. I find that the plaintiff did not at any time conceal her cohabitation with J.R. either from the Court or from the defendant.

29. I find that as of February 1, 1981 the plaintiff had established a permanent relationship with J.R. and that as of February 1, 1981 she was habitually residing with J.R. in a life-style which would lead a reasonable person to believe that they were living in marital relationship.

30. I find that the plaintiff and J.R. spent weekends together, resided together, socialized together as a couple, planned parties together, and took trips together,and that the conduct of the plaintiff and J.R. gave the outward appearance of marriage as of February 1, 1981.

31. I find that the living arrangements and life-style shared by the plaintiff and J.R. demonstrated that their relationship was not a temporary liaison, and that as of February 1, 1981 a permanent enduring

relationship had developed, which relationship gave the outward appearance of marriage.

32. I find that the plaintiff as of February 1, 1981 was receiving a measure of support from J.R. by virtue of his paying the rent and utilities, and that continued alimony paid by the defendant after February 1, 1981 would, to a certain extent, provide the plaintiff with overlapping support.

III. CONCLUSIONS OF LAW RE: PLAINTIFF'S COMPLAINT FOR CONTEMPT

1. The plaintiff's relationship with J.R., consisting of sharing a residence, socializing as a couple, eating their meals together, taking trips as a couple, and attending functions together would lead a reasonable person to believe that they were living in a marital relationship. Such relationship is sufficient to create

an outward appearance of marriage as of February 1, 1981.

2. If language exists in a separation agreement which is ambiguous and does not have a clear and precise definition, extrinsic evidence may be offered and received by the judge as an aid to construing the contract and the intent of the parties.

3. A contract must be interpreted as to give effect to the intention of the parties as it appeared at the time of the contract, insofar as the intent is ascertainable and lawful.

4. The language "living together with a member of the opposite sex, so as to give outward appearance of marriage" relates to the conduct of the plaintiff, and the objective nature of the relationship, and does not depend on whether or not third persons are led to believe in the existence of a

ceremonial marriage.

5. The termination of alimony pursuant to the language contained in Article 2(B) of the separation agreement does not require the defendant to prove that his former wife made affirmative representations to third parties that she and her paramour were married.

6. By her actions, the plaintiff has forfeited her right to receive alimony from the defendant pursuant to the terms of Article 2(B) of the separation agreement after February 1, 1981. To hold otherwise would create a situation where an ex-wife could receive support from her paramour, and in addition compel her ex-husband to pay support by the simple expediency of never formally participating in a marriage ceremony.

7. To eliminate alimony for a woman

who remarries and to allow overlapping support for a woman who enters into a continuous and open unmarried relationship would unfairly make a distinction based upon a title, rather than upon the reality of the situation.

IV. CONCLUSIONS OF LAW RE: DEFENDANT'S COUNTERCLAIM

1. The defendant by virtue of his counterclaim seeks equitable relief relative to the return of alimony previously paid by him. This claim is cognizable under the general principles of equity jurisdiction granted through the Probate Court pursuant to G.L. Ch. 215, § 6, which, inter alia, confers concurrent jurisdiction upon the Probate Court to grant equitable relief in controversies over property between persons who have been divorced.

2. The fact that the defendant included in his counterclaim a prayer

that the defendant be ordered to compensate him directly does not remove the case from the jurisdiction of the Probate Court. Relief is based on the allegations of the counterclaim, and not on its prayers.

3. The plaintiff's conduct and her collection of alimony from the entry of the judgment of divorce absolute through January 31, 1981, did not constitute a wrongful and fraudulent act, as alleged in the defendant's counterclaim.

_____ _____

DATE JUSTICE

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth

At Boston, September 13, 1984

In The Case No. SJC-3323

ANNE C. BELL

VS.

LOWRY M. BELL, JR.

pending in the Probate and Family Court Department of the Trial Court for the County of Norfolk, No. 74D1615

ORDERED, that the following entry be made in the docket; viz.,-

Judgment of the Probate Court affirmed.

By the Court,

/s/ Frederick J. Quinlan,
Asst. Clerk

Sept. 13, 1984

See opinion on file.